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“SUBJECT-MATTER.”

In positive law “subject-matter” is the term used to denote the content—that is, the subjects or matters presented for consideration—of either the whole of the law or by some particular part of it, and these are always legal rights.¹

Sometimes, unfortunately, the term “subject-matter” is used in another sense, to designate the *res* or tangible object, such as a chattel, or land, with which the law may have some connection or relation. A use of a term in a double sense is always confusing, and here it is also incorrect. A general term of this sort should be one that can be used generally. It should be one whose application is always complete. When an expression is capable of use in two senses, one of which is always true and the other may be true or false, if both are not necessary, the true ought to be adopted as the sole expression. If one sense is capable of definition and application and the other is not, the first should be followed and the other abandoned. This is the only way to avoid inconsistencies and difficulties, if not positive danger of perpetrating wrongs through misconceptions. While the expression “subject-matter” when used in the sense of a *res*, or physical object, sometimes seems appropriate, at other times it does not. In a sale, the title to some chattel is transferred from one person to another, and sometimes the chattel—a horse, a wagon, a desk, or grain, as the case may be—is spoken of as the “subject-matter of the sale,” and it is referred to thus in a number of connections, as “mistake as to the existence or identity of the subject-matter,” “legality of subject-matter,” or “title to the subject-matter,” all of which if followed up will ultimately lead to some wall of difficulty. How, for example, is it possible to find illegality in a *res* or other corporeal thing itself? But let us take some further illustrations. Suppose that A hires B’s horse for a drive. What is the subject-matter here? Is it the horse? Then, according to this use, the subject-matter of the contract of sale and of the contract of hiring is the same, and how will the contracts be distinguished? Again, suppose that A agrees to work for B for a certain period less than a year as driver of a horse, for B’s agreement to pay him a certain sum of money. What is the subject-matter in this case? Is it still the

¹Holland on Jurisprudence, Chaps. VII, XII, XIII; 7 Am. and Eng. Encyc. of Law (2nd Ed.) 114; 27 Am. and Eng. Encyc. of Law (2nd Ed.) 195; 50 Century Digest, 2593-2595.

horse? If so, suppose A, instead of agreeing to drive a horse, agrees to sing. What is the subject-matter now? What is the subject-matter of a contract to marry? Of a contract to transmit a telegram? Is there no subject-matter to the contract to sing or marry? If there is, why have the term "subject-matter" used in one sense there and in another in the other contracts? Even in the domain of property difficulties are encountered in employing the term "subject-matter" in a physical sense. What is the *res* in incorporeal chattels or hereditaments? In the realm of torts and crimes, what is the subject-matter in the physical sense. What is the subject-matter of slander, of libel, of violation of privacy, of fraud, of negligence, of assault and battery, of false imprisonment, of malicious prosecution? Is it some chattel or some person? There is no need of pursuing this topic further to show how useless, inconvenient and inconsistent is any attempt to make the term "subject-matter" have a corporeal significance. That term is needed for another purpose, where no other will do, and nothing is gained by trying to employ it in a physical sense, or even in a double sense. So employed, it either will not apply at all, or, if it does apply, there is no sure way of determining its scope and meaning.²

Employed in the sense first indicated in this article, the term is not only easily defined but is easy of application, it runs throughout the whole realm of the law and is necessary in order to explain a great many phenomena found therein.

In its broadest application "subject-matter" includes all legal rights. Positive law is concerned only with legal rights and they are its subject-matter, *i. e.*, those things which are included within its boundaries and which, therefore, distinguish it from moral law, physical law and everything else, *e. g.*, mineralogy, or geology, or chemistry, or botany, or literature, or mathematics. These rights may be those which exist against all the world, or against some particular person. They may be rights of the public, or of private individuals. They may be antecedent or remedial. But nothing else than legal rights is included within the subject-matter of the law. They are the matters, or subjects, about which the law is concerned. It is not made up of objects but of rights. The "subject-matter" of a wagon is wood, iron and all its other ingredients. Legal rights may involve a *res*, or corporeal object, but

²But see 6 Cent. Dig. 55 (§ 61); 11 Cent. Dig. 23; Pomeroy's Code Remedies, (4th Ed.) § 369.

that does not make the latter the subject-matter of law. The ingredients of the law are legal rights.

Positive law has many branches, or parts, and, while they are all alike in relating to legal rights, each differs from the other as the particular legal rights composing its subject-matter differ from the legal rights composing the subject-matter of the other. Though they all involve the same matter, their subject-matter varies and they form different branches of positive law.

The subject-matter of torts is, in general, private rights *in rem*, invaded by wrongs. In any particular tort the subject-matter is the particular private right *in rem* which is violated by the wrongful act of another. If that right is the right to reputation, the tort is called slander or libel; if the right to freedom from bodily harm, assault and battery; if the right to freedom of locomotion, false imprisonment; if the right to possession of property, trespass; if the right to the ownership of land, waste; of chattels, conversion; if the right to have care exercised, negligence. A has the right against all the world not to have his reputation injured. B makes the statement that A is a thief and ought to be in the penitentiary. This is an invasion of A's right of reputation and constitutes the tort of slander, whose subject-matter is this right invaded. If A is a thief, he has no right not to have this statement made and the alleged tort is without subject-matter. A has the right not to have any one, without justification, do him bodily harm. B does so harm him. This is the tort of battery, and its subject-matter is the right *in rem* which A has and which B has invaded. If it can be shown that B has not committed the battery, or that it was done in justifiable self-defense, there is no subject-matter for a tort. A has the right against all the world to use, possess and dispose of a horse. B takes the horse into his possession and uses it against A's consent. B's acts amount to the tort of conversion, the subject-matter of which is the rights of ownership invaded. If the horse really belongs to B, or if A consents to B's taking and using it, no right of ownership in the horse is violated, and there is no subject-matter for the tort alleged.

The subject-matter of crimes is public rights *in rem* invaded by wrongs. In any particular crime the subject-matter is the particular public right *in rem* which is violated. If the right is that of the State not to have human life taken, the crime is murder; if the right of the State not to have a breach of the peace, assault and battery; if the right of the State not to have any one defame the reputation of another, libel; if the right of the State not to

have anything cause inconvenience or injury to the public, nuisance; if the right of the State not to have the malicious burning of another's dwelling-house, arson; if the right of the State not to have a breaking and entering of another's dwelling-house in the night-time to commit a felony, burglary; if the right of the State not to have the unlawful taking of the possession of the chattels of another with intent to steal, larceny; and so on. A State of the Union has the right against all the world not to have any one within its jurisdiction killed without justification. A is within the State and B kills him with premeditated design. This is the crime of murder and its subject-matter is the public legal right invaded. If B does not kill A by design but through accident, there is no public legal right of the above sort invaded, and hence no subject-matter for murder.

The subject-matter of contracts is private legal rights *in personam* created by agreement; of quasi-contracts, private legal rights *in personam* created by implication of law. In a unilateral contract only the promisee has a legal right; in a bilateral, both parties. If the subject-matter of a contract is the transfer of the right to use, possess and dispose of land, the result is a conveyance; if the transfer of the right to use and possess land for a term, a lease; if the transfer of the right to use, possess and dispose of chattels, a sale; if the transfer of the right of possession, or holding, of a chattel for a time to one for the right of another to have diligence exercised and to have the chattel returned or delivered over, a bailment; if the right of one to the payment of indemnity or a definite amount of money on the happening of a certain event, and of another to have the payment of premiums, insurance; if the establishment of the rights that a husband and wife have against each other and the community has against both, marriage; if the right of one person to the services of a domestic, or a day laborer, or a mechanic or a professional man, and the corresponding right to compensation, employment; if the right of one to the services of an agent and the right of the agent to compensation and authority, agency; if the right of a number of men to carry on a business and share as co-owners in the profits, a partnership. If the subject-matter of a contract is a right ancillary to another right, it is an accessory contract, as distinguished from a principal contract, and contracts with this kind of subject-matter are guaranties, warranties, pledges and mortgages. A promises to make for B a machine of a certain pattern for two hundred dol-

lars in return for B's promise to pay two hundred dollars for the machine. This is a contract to make a machine. The subject-matter of this contract is the right of B to have the machine made according to the pattern and delivered to him, and the right of A to have the payment of two hundred dollars when the work is done. If instead of promising to make the machine A in writing sells for two hundred dollars a particular machine already made and B promises in writing to pay two hundred dollars therefor, this is a sale. The subject-matter is the actual transfer of the title, and the right of B to delivery and the right of A to the payment of two hundred dollars. If the machine, unknown to the parties, has been destroyed before the completion of the contract, there is no subject-matter thereof, as neither party has acquired any rights, it being a condition precedent implied by law that where parties contract on the basis of the existence of some specific chattel, that chattel shall continue to exist.

The subject-matter of damages is the remedial rights *in personam* to compensatory, exemplary and nominal damages for torts, and to compensatory damages for breaches of contract, and in quasi-contract.

A court is said to have "jurisdiction over the subject-matter" when it has the power to hear, try and determine some right, not in a particular case but in every case of that class. A court has criminal jurisdiction when it has the power to hear, try and determine the subject-matter of public legal rights; civil jurisdiction, the subject-matter of private legal rights; equity jurisdiction, the subject-matter of rights recognized and enforced by a court of equity; concurrent jurisdiction, the subject-matter of rights over which another court can take cognizance; appellate jurisdiction, the power to review, correct and finally determine the subject-matter of rights tried in the first instance by another court. A court does not have the right (power) to make or annul a valid contract, but it does have jurisdiction over trusts and over contracts and damages. A enters into a contract of separation with B and her trustee C, in which C covenants as party of the third part to indemnify A for any debt he may be compelled to pay for B. B asks to have the court remove C for incompetency and appoint another trustee. The subject-matter here is not the right to appoint a trustee or a right created by the contract or to damages for breach of it, but the right to make a new contract for the

parties. This the court does not have jurisdiction to do.³ R sues the city of M for damages for personal injuries. By statute notice of the accident is required to be given the city within six months. R does not allege such notice, but a demurrer is not interposed, and he recovers judgment in the lower court. On appeal it is contended that the trial court did not have jurisdiction over the subject-matter of the suit. The subject-matter in this case is the right R has to compensation for injuries. The district court had jurisdiction over that and, therefore, had jurisdiction over the subject-matter, and the fact that the court did not have jurisdiction over this particular case may be and is waived. Failure to give notice affects the right to recover, not the jurisdiction of the court.⁴ A court of one of the States of the Union which by the State constitution is given jurisdiction to try suits for divorce when it has jurisdiction of the person and the subject-matter, grants a divorce to a husband who married his wife in the State and has always had his domicile there, though at the time of the suit the wife, without intent to change her domicile, is residing in another State, and was served only by substituted process. Jurisdiction over the subject-matter of a suit for divorce is the right of a court to act upon the matrimonial *status* of its citizens, or upon the rights of the parties and the community created by the contract of marriage. That power was possessed by this court, as the domicile of both parties was in the State and jurisdiction of the person was obtained by the substituted service, and, therefore, the court had jurisdiction, and the judgment of divorce is valid although without facts to sustain it.⁵

When statutes permit the joinder of causes of action which are connected with the same subject (subject-matter) of action, causes of action may be joined when they are for violations of the same legal right *in rem* or any legal rights created by one contract; that is, the subject-matter of his cause of action is the "plaintiff's principal primary right," the violation of which gives rise to the cause of action, and, if different causes of action are all violations thereof, they may be joined.⁶ A promises to print a book for C

³Hughes *v.* Cuming (1900) 165 N. Y. 91; United States *v.* Crawford (1891) 47 Fed. 561.

⁴Reed *v.* City of Muscatine (1897) 104 Ia. 183; Hughes *v.* Kline et al. (1858) 30 Pa. St. 227, 230; The Chicago and Atlantic Railway Company *v.* Sutton et al. (1891) 130 Ind. 405.

⁵Hunt *v.* Hunt (1878) 72 N. Y. 217.

⁶Bliss on Code Pleading, § 126; Bryant on Code Pleading, 260, 170.

from plates furnished by C in consideration of the latter's promise to pay a certain price. A breaks his promise and also injures the plates furnished by C in consideration of the latter's promise to pay a certain price. Under a statute permitting a joinder of causes of action connected with the same "subject (which means subject-matter) of action," can the two causes of action be joined? Yes. The subject-matter of the action is those rights, constituting the subject-matter of the contract, which have been violated by its breach. These are both the right to have the work done and the right to have diligence exercised in caring for the plates, and they are, therefore, "connected with the same subject of action."⁷ A and B are husband and wife. C harbors and maintains the wife, B, converts certain chattels to which A is entitled by virtue of the marriage, converts certain chattels to which A is entitled by virtue of a marriage settlement, and gets a deed from B to certain land whose rents A has been receiving. Can all these causes of action be joined in one suit? Yes. They are all connected with the same subject-matter of action,—those rights created by the marriage of A and B which have been violated by C.⁸

The subject-matter of litigation, or a lawsuit, is the right or rights actually put in issue by the pleadings. The principle of *res adjudicata* applies where a second suit involves the same subject-matter as a former suit which has been decided by a court of competent jurisdiction—that is, where the legal right, the violation of which is put in issue in the second case, is the same legal right whose violation was in issue in the first case. A sues B for rent which he claims has accrued on a lease up to 1877 and recovers, the execution and delivery of the lease not being put in issue. In 1878 A brings a second suit on the same lease for subsequently accrued rent and B denies the execution of the lease. In the first suit the subject-matter is the right to recover rent. In the second suit the subject-matter is the right to the lease. Therefore the judgment in the first suit is no bar to the second action.⁹

By the foregoing definition of "subject-matter," the specific applications thereof to the various branches of the law, and the authorities supporting it, the writer hopes that he has demonstrated not only what is the true meaning of the term, but that it should not be used in any other sense. Employed in a corporeal sense, the term is often bungling and incorrect; employed in its incor-

⁷Badger v. Benedict (N. Y. 1857) 4 Abb. Pr. 176.

⁸Hamlin v. Tucker (1875) 72 N. C. 502.

⁹Jacobson v. Miller (1879) 41 Mich. 90: 7 Words & Phrases, 6126-6130.

poreal sense—that is, made to connote only rights, it has a fuller and more precise meaning; in fact, sometimes, in this latter sense alone has it any meaning. By thus restricting “subject-matter” to its proper significance, difficulties and inconsistencies are avoided.

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